

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF GREGG ALLAN DALLAIRE, by its
Personal Representative, KATHY D. DALLAIRE,

UNPUBLISHED
December 21, 2010

Plaintiff-Appellant,

v

No. 292971
Ingham Circuit Court
LC No. 08-001494-NH

TREATMENT WORKS, INC., KAREN M.
MOORE, VERONA MORTON, NDUBISI EZE
IZIMA, IMOGENE RUFFIN, ALEKSANDRA
JASINSKI, DAVID E. MOORE and ESTATE OF
BARTON W. MORRIS,

Defendants-Appellees.

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

This case arises from the death of Gregg Allan Dallaire (hereinafter “the decedent”), which was allegedly caused by an overdose of Methadone prescribed and administered by Treatment Works, Inc. and its staff, Karen M. Moore, Ndubisi Eze Izima and Imogene Ruffin, in the course of their provision of outpatient substance abuse treatment.¹ The trial court granted summary disposition² finding that the medical malpractice claims brought by Kathy D. Dallaire, as the personal representative of the decedent’s estate, were barred by the statute of limitations and that Dallaire had failed to a state claim for ordinary negligence. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The decedent became addicted to Vicodin after sustaining injuries in a motor vehicle accident. On or about July 3, 2006, the decedent entered into an outpatient substance abuse treatment program run by Treatment Works, which involved the prescription and administration

¹ We note that Dallaire never effectuated service on Aleksandra Jasinski, Verona Morton, David Moore or the Estate of Barton Morris, and they will not be referenced further in this appeal.

² MCR 2.116(C)(7), (8).

of Methadone. The decedent died on July 6, 2006, allegedly as a result of an overdose of Methadone provided by Treatment Works. Dallaire contends that although Treatment Works, Moore, Izima and Ruffin held themselves out to be members of a state licensed profession, they were not licensed to prescribe and distribute Methadone. Contrary to this assertion, the record shows that Izima and Ruffin were respectively licensed as a physician and nurse.

Dallaire was appointed as the personal representative of the decedent's estate on November 28, 2006, and served Treatment Works, Moore, Izima and Ruffin with a notice of intent to file claim on September 11, 2008.³ The initial complaint was filed on November 14, 2008, only 64 days after service of the notice of intent. Treatment Works and its staff sought summary disposition based on Dallaire's failure to wait the statutorily required 182 days after serving the notice of intent before filing her complaint. They also argued that the complaint failed to state a claim of ordinary negligence against the nonprofessionals, comprised of Treatment Works and Karen Moore. The trial court dismissed the complaint without prejudice, but granted Dallaire 45 days to amend her pleading to add a claim of ordinary negligence against Moore and Treatment Works.

Dallaire timely filed her amended complaint, which alleged that Treatment Works and its staff owed the decedent various duties of care relating to his medical treatment, and that these duties were breached. Treatment Works and its staff again moved for summary disposition, asserting that the amended complaint still failed to allege any facts sufficient to state a cause of action sounding in ordinary negligence against the non-health care professionals, and that the suit was barred by the statute of limitations. The trial court granted the motion and dismissed Dallaire's claims without prejudice. Dallaire's request for reconsideration was denied and this appeal ensued.

II. MEDICAL MALPRACTICE VERSUS ORDINARY NEGLIGENCE

This Court reviews de novo motions for summary disposition based on the failure to state a claim.⁴ "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint."⁵ This Court examines the pleadings to determine whether the claims are "so clearly unenforceable as a matter of law that no factual development [could] possibly justify recovery."⁶ In reviewing this type of motion, we consider "only the pleadings."⁷ We also review de novo the grant of summary disposition based on a statute of limitations.⁸ This Court considers the evidence of

³ MCL 600.2912b.

⁴ MCR 2.116(C)(8); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁵ *Id.* at 119.

⁶ *Id.*

⁷ *Id.* at 119-120.

⁸ *Jackson v Detroit Med Ctr*, 278 Mich App 532, 539; 753 NW2d 635 (2008).

record, and accepts as true all allegations in the complaint unless contradicted by the documentary evidence.⁹ If no material facts are in dispute, the issue of whether the claim is time barred by the statute of limitations is a question of law for the Court.¹⁰ Questions of statutory interpretation are also reviewed de novo.¹¹

Dallaire contends that her claims are not based in medical malpractice, but rather are grounded in ordinary negligence or “common law malpractice,” which is subject to a three-year limitations period. Dallaire contends that Treatment Works and its staff merely held themselves out as being licensed, but did not possess proper licensure. She asserts that the protections afforded to medical malpractice defendants could not have been meant to protect unlicensed individuals and entities holding themselves out to be licensed.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature.¹² Where statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute.¹³ An unambiguous statute must be enforced as written.¹⁴ The term “ambiguity,” when applied to statutory provisions, has been defined by our Supreme Court as:

[W]hen there can be reasonable disagreement over a statute's meaning, or, as others have put it, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, [a] statute is ambiguous. For example, this Court has concluded that statutes [are] ambiguous when one word in the statute has an unclear meaning, when a statute's interaction with another statute has rendered its meaning unclear, or when application of the statute to facts has rendered the correct application of the statute uncertain.¹⁵

Asserting she need not follow the procedures that apply to medical malpractice cases, Dallaire relies on the following statutory language:

⁹ *Carmichael v Henry Ford Hosp*, 276 Mich App 622, 624; 742 NW2d 387 (2007).

¹⁰ *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992).

¹¹ *Dep't of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

¹² *Institute In Basic Life Principles v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996).

¹³ *Id.*

¹⁴ *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

¹⁵ *Peterson v Magna Corp*, 484 Mich 300, 329; 773 NW2d 564 (2009) (citation omitted).

A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.¹⁶

Dallaire argues that the statute indicates that the common law applies to suits against unlicensed persons who hold themselves out to be licensed medical professionals and, as a result, the statutory restrictions on medical malpractice suits are inapplicable. This is a misreading of the statute.

Although the statute states that the rules of common law apply to actions “against members of a state licensed profession,”¹⁷ it does not differentiate between licensed and unlicensed individuals.¹⁸ Dallaire fails to provide any case law in which a court allowed a medical malpractice plaintiff to avoid the requirements of providing a notice of intent to sue or the filing of an affidavit of merit.¹⁹ It is irrelevant whether Treatment Works or its staff were actually licensed, as Dallaire claims that they held themselves out as being licensed. As there are no separate categories of malpractice claims for unlicensed individuals or entities, Dallaire’s claim is grounded in malpractice not ordinary negligence and is subject to the applicable statutory requirements.

This is consistent with the two-step analysis that has been developed to determine whether a claim sounds in medical malpractice or ordinary negligence. The initial part of the analysis requires us to determine whether the asserted claim pertains to an action that occurred during the course of a professional relationship.²⁰ The second part of the analysis requires a determination of whether the claim presented raises questions involving medical judgment.²¹ If both parts of this test are answered in the affirmative, the claim properly sounds in medical malpractice.²²

¹⁶ MCL 600.2912(1).

¹⁷ *Id.*

¹⁸ *O’Neal v St John Hosp & Med Ctr*, 487 Mich 485; ___ NW2d ___ (2010), slip op at 7 n16 (stating this statute means that common law rules apply to all medical malpractice actions except where abrogated by statute).

¹⁹ See, MCL 600.2912b and MCL 600.2912d.

²⁰ *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004); see also *Kuznar v Raksha Corp*, 481 Mich 169, 176-178; 750 NW2d 121 (2008).

²¹ *Bryant*, 471 Mich at 422.

²² *Id.*

A professional relationship is found to exist when a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, are subject “to a contractual duty” that requires them “to render professional health care services.”²³ Dallaire alleges the decedent entered a program of treatment, and that Treatment Works, Moore, Izima and Ruffin represented themselves as a licensed health care facility and professionals. Taking the allegations of the complaint to be true, Treatment Works and its staff were under a contractual duty to render professional health care services to the decedent, satisfying the first step in our analysis.

Addressing the second part of the test, if a claim involves questions of medical judgment, then the reasonableness of the actions comprising the alleged malpractice must be evaluated by a jury only after the standard of care for the medical treatment at issue is explained by experts.²⁴ In contrast, if the actions constituting the alleged wrongdoing can be evaluated by lay jurors on the basis of their common knowledge and experience, the claim will be grounded in ordinary negligence.²⁵ Dallaire asserts that the culpable conduct of Treatment Works and its staff included a lack of familiarity with the decedent’s medical history, failing to properly assess the effects of each dose of Methadone, continuing to increase the Methadone dosage without proper monitoring, failing to observe and document the objective signs of persistent opioid withdrawal, and failing to properly determine the decedent’s tolerance for opioid medications. Because Dallaire’s claims involve the proper dosage of Methadone and objective symptoms of opioid withdrawal, which clearly present questions outside the realm of common knowledge and experience, the second requirement of the test has been affirmatively established and her claim is, therefore, one for medical malpractice.²⁶

In support of her position, Dallaire relies on a recent case by our Supreme Court in which the Court held that a pharmacy was not a licensed health care facility and, thus, subject to the three-year limitations period for ordinary negligence.²⁷ Contrary to Dallaire’s contention, the factual circumstances of this case are distinguishable as the cited case did not involve allegations that the pharmacy represented itself to be a licensed health care facility. Dallaire clearly alleges that Treatment Works and its staff represented themselves to be a licensed health care facility and professionals, which necessitates imposition of the limitations period for a medical malpractice claim.²⁸

²³ *Id.*

²⁴ *Id.* at 423.

²⁵ *Id.*

²⁶ Moore and Treatment Works argue they cannot be sued for medical malpractice because they are not a licensed professional or health care facility. Assuming Dallaire’s allegations that Moore and Treatment Works represented themselves as being licensed and engaged in the dispensation of Methadone are true, a claim has been stated against them for malpractice.

²⁷ *Kuznar*, 481 Mich at 171-172.

²⁸ MCL 600.2912(1).

Because Dallaire's allegations sound exclusively in medical malpractice and not ordinary negligence, the trial court properly granted summary disposition in favor of Treatment Works and its staff.

III. STATUTE OF LIMITATIONS

An action for medical malpractice must be filed within two years of the alleged negligent act that is the basis of the claim or within six months of the time a plaintiff discovers or should have discovered the claim.²⁹ Dallaire concedes that her claim accrued on the date of decedent's death.³⁰ The statute of limitations expired on July 6, 2008, absent the applicability of the wrongful death savings provision, which provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.³¹

The saving statute is applicable because the decedent died before the statute of limitations expired. Dallaire was appointed personal representative for the decedent's estate on November 28, 2006, and was required to commence her action by November 28, 2008 to avoid having her claims barred by the statute of limitations.³² Because Dallaire filed her complaint on November 14, 2008, it was within the required two-year period.

But Dallaire also had to provide a notice of her intent to sue at least 182 days before filing suit.³³ The notice of intent was submitted on September 11, 2008, only 64 days before filing of the complaint. Our Supreme Court has held that a complaint filed before the expiration of the 182-day notice period is insufficient to commence a legal action.³⁴ The complaint filed on November 14, 2008, did not commence an action and did not toll the statute of limitations. While the notice period did not expire until March 12, 2009, the statute of limitations and saving statute had expired.

²⁹ MCL 600.5838a and MCL 600.5805(6).

³⁰ July 6, 2006.

³¹ MCL 600.5852.

³² *Id.*

³³ MCL 600.2912b.

³⁴ *Burton v Reed City Hosp Corp*, 471 Mich 745, 753-54; 691 NW2d 424 (2005).

Dallaire also argues that submission of the notice of intent served to toll the statute of limitations.³⁵ While there does exist a provision for tolling the statute of limitations if a notice of intent is filed before the statute runs³⁶, it does not provide for the tolling of the saving statute.³⁷ Our Supreme Court has noted that the tolling provision, by its plain language, tolls only “statutes of limitations or repose.”³⁸ Dallaire contends that MCL 600.5852 provides a separate limitations period and that this second statute of limitations period ran for two years after she was appointed representative of the decedent’s estate.³⁹ This argument fails because the Supreme Court has previously considered and rejected it,⁴⁰ having found that the saving statute is not a statute of limitations or repose.⁴¹

Because the statute of limitations on Dallaire’s claims expired on July 6, 2008, and the notice of intent was not submitted until September 11, 2008, the notice of intent could not toll the statute of limitations. Although the saving statute had not yet expired, the tolling statute did not operate on the saving statute.⁴² Since filing of the notice of intent did not toll the saving statute, the saving statute expired on November 28, 2008. The complaint filed on November 14, 2008 did not validly commence an action as Dallaire did not provide the notice of intent until September 11, 2008, and could not validly commence her suit until March 12, 2009. Because all of the alleged medical malpractice claims expired on November 28, 2008, the trial court properly granted summary disposition premised on the statute of limitations.

IV. RES JUDICATA EFFECT OF DISMISSAL

Dallaire’s final argument is that the trial court did not realize that a dismissal without prejudice would effectively operate as a dismissal with prejudice because of the doctrine of res judicata. Dallaire asserts that the trial court’s dismissal without prejudice is a clear indication that it did not intend to foreclose her from pursuing her claims. Dallaire’s assertion that the trial court failed to comprehend the impact of its own order is speculative and unconvincing. Even if Dallaire were correct, she does not provide any authority to support her contention that this

³⁵ MCL 600.5856(c).

³⁶ *Id.*

³⁷ *Waltz v Wyse*, 469 Mich 642, 650-652; 677 NW2d 813 (2004).

³⁸ *Id.*; MCL 600.5856.

³⁹ Dallaire cites to *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz*, 469 Mich 642 (2004).

⁴⁰ *Waltz*, 469 Mich at 648, 650.

⁴¹ *Id.*

⁴² *Id.* at 650-651.

should serve as a basis for reversal. The failure to brief a position on appeal constitutes abandonment of that argument.⁴³

Affirmed.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Donald S. Owens

⁴³ *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).